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In the Supreme Court
OF THE
United States

No. 550

OCTOBER TERM, 1955

JAMES ARENA,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

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Subject Index

	Page
Opinion below	2
Jurisdiction	2
Questions presented for review	2
Statutes involved	3
Statement of the case	4
Reasons for allowance of writ	9
Argument	10
1. Admission of business records in evidence without proper foundation	10
2 Testimony of witnesses as to meaning of words, figures, symbols and initials in exhibits	13
3. Sufficiency of the evidence as a matter of law to sustain the verdict of the jury in a perjury case	16
4. The Court of Appeals erred in approving the instructions given by the trial court as to the corroboration required in perjury cases	20
5. The first count of the indictment was duplicitous in that it alleges more than one offense in a single count.	25
Conclusion	30

Table of Authorities Cited

Cases	Pages
Bollenback v. United States, 326 U.S. 607, 66 S.Ct. 402, 405	24
Carpenter v. Hudspeth, 10 Cir., 112 F. 2d 126	27
Cornes v. United States, 9 Cir., 1941, 119 F. 2d 127, 129	25, 26, 27
Daeche v. United States, 2 Cir., 1918, 250 Fed. 566, 571-572	19
Davena v. United States, 9 Cir., 1952, 198 F. 2d 230, 231	19
Dimenza v. Johnston, 9 Cir., 130 F. 2d 465, 466	27
Fox v. Order of United Commercial Travelers, 5 Cir., 1952, 192 F. 2d 844, 846	15
Fraser v. United States, 6 Cir., 145 F. 2d 145, 151	23
Greenbaum v. United States, 9 Cir., 80 F. 2d 113, 116	25, 26
Hammer v. United States, 271 U.S. 620, 629, 46 S. Ct. 603, 605	18
Harper v. United States, 8 Cir., 1944, 143 F. 2d 795, 806	11, 13, 15
Landay v. United States, 108 F. 2d 698, 704-705	13
Masterson v. Penn. R. Co., 182 F. 2d 793, 797	13
McWhorter v. United States, 193 F. 2d 982, 983-985	20, 23
Meyer v. Everett Pulp and Paper Co., 9 Cir., 1912, 193 F. 857, 862	14, 15
Miranda v. United States, 196 F. 2d 408, 411	20
Opper v. United States, 1954, 348 U.S. 84, 92-93, 75 S. Ct. 158	19
Palmer v. Hoffman, 318 U.S. 109, 115, 63 S. Ct. 477, 481	13
Phillips & Benjamin Co. v. Ratner, 2 Cir., 206 F. 2d 372, 375-376	15
Radomsky v. United States, 9 Cir., 180 F. 2d 781	19
Seymour v. United States, 77 F. 2d 577	28
Southern Ry. Co. v. Mooresville Cotton Mills, 4 Cir., 187 F. 72, 73	15

Pages

United States v. Buckner, 2 Cir., 118 F. 2d 468..... 23
United States v. Cason, 39 F.S. 731, 734..... 27
United States v. Emspack, 95 F.Supp. 1012, 1016..... 29
United States v. Hiss, 2 Cir., 185 F. 2d 822, 824..... 23
United States v. Neff, 3 Cir., 212 F. 2d 297, 306.....19, 22
United States v. Oram, 3 Cir., 207 F. 2d 148, 160..... 29
United States v. Palese, 3 Cir., 133 F. 2d 600, 603..... 19
United States v. Quick, 3 Cir., 128 F. 2d 832, 838..... 15
United States v. Rose, 3 Cir., 215 F. 2d 617, 624-625.....20, 23
United States v. Seavey, 3 Cir., 180 F. 2d 837, 839..... 19
United States v. Wood, 1840, 14 Pet. 430, 440..... 18

Warzower v. United States, 1941, 312 U.S. 342, 347-348.... 22
Wheeler v. United States, 211 F. 2d 19, 23.....11, 13

Statutes

18 U.S.C., Section 338..... 26

18 U.S.C., Section 1621.....1, 3, 27

18 U.S.C., Section 3231..... 5

28 U.S.C., Section 1254 (1)..... 2

28 U.S.C., Section 1732.....2, 9, 12

28 U.S.C., Section 1732 (a).....4, 12, 13

Rules

Federal Rules of Criminal Procedure
Rule 7 (c)..... 10
Rule 8 (a)..... 10
Rule 18 5
Rule 37 (b)(2)..... 2

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PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit.

The petitioner, James Arena, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit which affirmed a conviction of petitioner on one count of an indictment charging him with the crime of perjury committed before a Federal Grand Jury. (18 U.S.C. 1621.)

OPINION BELOW.

The opinion of the United States Court of Appeals for the Ninth Circuit has not yet been reported but is included in the transcript of record at pages 251 to 267. A copy of the opinion is appended.

JURISDICTION.

The judgment of the Court of Appeals was entered on October 5, 1955. (R. 268.) A copy of the judgment is appended. A petition for rehearing was filed on October 28, 1955 and denied on November 7, 1955 (R. 269), and the mandate was by said Court of Appeals, on November 8, 1955, ordered stayed until the disposition of the present petition.

The jurisdiction of this Court is invoked under Section 1254(1) of Title 28 U.S.C. and Rule 37(b)(2) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED FOR REVIEW.

The questions presented by this petition are:

1. Did the trial Court err in admitting in evidence certain purported business records over petitioner's objections that no proper foundation had been established for their admission under Section 1732 of Title 28 U.S.C.?

2. Did the trial Court err in permitting prosecution witnesses to testify as to the meaning of certain initials, figures, dates and symbols contained in exhibits, which had not been prepared by the witnesses and which pertained to

transactions in which they had not participated and of which they had no personal knowledge, over petitioner's objections that such testimony was hearsay or the opinion and conclusion of the witness?

3. Did the trial Court err in denying petitioner's motion for judgment of acquittal on Count I of the indictment on the grounds that the evidence was insufficient as a matter of law to sustain the verdict?

4. Did the trial Court err in giving its instructions to the jury as to the quantum of evidence required in perjury cases?

5. Did the trial Court err in denying petitioner's motion to dismiss Count I of the indictment on the ground that said count was duplicitous in that two or more offenses are charged in one count?

STATUTES INVOLVED.

The statutes involved are:

Title 18 U.S.C. Section 1621, which provides:

> "Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be

fined not more than $2,000 or imprisoned not more than five years, or both."

Title 28 U.S.C., Section 1732(a), which provides:

"(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

"All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

"The term 'business', as used in this section, includes business, profession, occupation, and calling of every kind."

STATEMENT OF THE CASE.

Petitioner was indicted on June 3, 1953, in the United States District Court for the Northern District of California. The indictment charged him in two counts with having committed the crime of perjury when testifying before a Federal Grand Jury. Following a trial by jury, petitioner was convicted on Count I and sentenced to three years imprisonment. (R. 33-34.) Count II of the

indictment was dismissed. The Court of first instance had jurisdiction. (18 U.S.C. 3231; Rule 18, Federal Rules of Criminal Procedure.) Upon conviction the judgment was affirmed by the United States Court of Appeals for the Ninth Circuit.

Count I of the indictment (which petitioner contends is duplicitous)was summarized by the prosecution as follows:

> "The first count alleges in substance that the dedendant falsely swore that he had not received $38,000.00 from Mr. Baskin at a bank in Oakland." (Government's Memorandum in Opposition to Motion to Dismiss the Indictment.)

The government introduced evidence through the testimony of the witness Irving Baskin that early in December of 1947 (December 4, 1947) he, at the direction of one Zola (Tiny) Heller, went to the Twelfth and Broadway Branch of The Bank of America, Oakland, California, and there cashed checks totaling $38,000.00, which he received in thirty-eight $1,000.00 bills, and which he there counted out and turned over to petitioner. (R. 91-96.)

The government contended and introduced evidence to show that petitioner placed wagers with Mr. Heller on behalf of one Arthur Samish, as a result of which Samish won a total of $34,800.00 covering transactions for the week ending November 30, 1947. (R. 143.)

To corroborate Baskin's testimony that he had delivered the $38,000.00 to petitioner at a bank in Oakland the government called as witnesses, in addition to Irving

Baskin, who was Heller's bookkeeper and who did Heller's banking for him, F. W. Whitted, who was employed by Heller from 1941 through sometime in October or early November of 1947 (R. 100, 102), Rosalind Heller (Heller's widow) and Earl Madeiros, who in December of 1947 was an Assistant Chief Clerk at the Bank of America, Twelfth and Broadway, Oakland, California.

Whitted testified that he was employed by Heller from 1941 to October 1947 for the purpose of "making the prices" on baseball games (R. 100-101); that he had seen the petitioner at Heller's place five or six times a week (R. 102); that in 1946 and 1947 petitioner had placed bets with Heller ranging from one hundred to two or three thousand dollars (105); that Exhibit No. 10 in his handwriting reflects bets placed by petitioner in October, 1947 and the initials "J.A." appearing on these exhibits were used by him to refer to petitioner (R. 109); that Mr. Heller's handwriting appears on Exhibit No. 2; that he saw Mr. Heller make entries in it; that he saw Mr. Heller work on books like Exhibit No. 3; that the handwriting is that of Mr. Heller and that this exhibit reflects single bets on different games (R. 119, 120); that he recorded bets in the name of Arthur Samish; that at one time Mr. Samish placed bets himself and at a later time petitioner placed bets for Arthur Samish (R. 120, 121); that when these bets were placed earlier there was a designation "AS" for the bettor and later there was a designation "SA" (R. 121); that he had been present when he heard petitioner place telephone calls from Mr. Heller's office in which petitioner asked for "the Colonel" and that he knows Arthur Samish to be a person using

the designation "the Colonel" (R. 124); that settlements of Samish's bets were later made to petitioner (R. 125); that Baskin used to go to get cash at the bank for Heller, which he delivered to Heller at Heller's office (R. 126); that the bet reflected by Exhibit No. 10 was made by petitioner on behalf of Samish but carried under the designation "J.A." (R. 131); that on several occasions he observed payments being made by Mr. Heller to petitioner in amounts of several thousand dollars and that settlements were customarily made on Monday or Tuesday (R. 131, 132).

Rosalind Heller, Zola Heller's widow, testified that her husband operated a betting commission with his office in the rear of the liquor store and that he also conducted his betting activities at home (R. 133); that she recorded bets for him on occasions and knows what kind of records he kept and knows his handwriting; that Exhibit No. 2 is his book and she observed him making entries in it on many occasions (R. 134); that Exhibit No. 3 is a record of a type maintained by Mr. Heller (R. 135) and it is in his handwriting (R. 135). In admitting Exhibit No. 3 in evidence the trial Court said:

> *"It will be admitted for the limited purpose of being an exemplar of certain business records kept by Mr. Heller, and having been further identified for that purpose only."* (R. 136.)

She further testified that Exhibits 4 and 5 are business records of Heller (R. 134); that Exhibits 6, 7 and 8 are in Heller's handwriting (R. 137); that on occasions she recorded bets for Mr. Heller but that she did not

record them in his books; that she noted them on a separate piece of paper (R. 139); that she did not have to record symbols; that she only wrote in one bet for petitioner (R. 139); that the initials "S.A." were used for "Artie Samish" and that on check stub 1264 (Exhibit 8) the "S.A." means "Artie Samish Account to James Arena" (R. 142); that a part of Exhibit No. 3 reflects a win by the bettor of $34,800.00 for the week ending November 30, 1947 (R. 142, 143); that she heard petitioner on several occasions make phone calls and ask for Mr. Samish (R. 154); that she never personally made any of the entries in Heller's books (R. 154) and had nothing whatsoever to do with the transactions involved in Exhibits 3, 4, 5, 6, 7 and 8 or the preparation of parts of those exhibits referred to by her in her testimony (R. 155-157).

Earl Madeiros testified that in December, 1947, a paying teller at the bank where he was then employed, presented to him for approval for cashing checks totalling $38,000.00; that he indicated his approval by initialing each check (R. 159); that a film (Exhibit No. 11) of the checks for which cash was paid at the bank on December 4, 1947, shows four successive checks in amounts totaling $38,000.00 (R. 160); that the teller's pay proof (Exhibit No. 12) of December 3, 1947, reflects four successive amounts which were cash payments for checks, which totaled $38,000.00; that the rubber stamp mark "10-C" on Exhibits Nos. 11 and 12 indicates that Herman Wirth was the teller who paid cash for the four checks (R. 163); that the only knowledge that he had of the entire transaction was the fact that Mr. Wirth (the teller) pre-

sented these checks to him and that he conferred with the senior officer and approved the payment of the checks (R. 166).

Following the introduction of the above-summarized statement of the testimony of the essential witnesses the prosecution read in evidence certain portions of the transcript of the testimony of petitioner before the Grand Jury. (R. 168-169.) This testimony related to purported bets made by petitioner with Mr. Whitted in 1946 and had no relation to the transaction of December, 1947.

Petitioner did not take the witness stand and no evidence was offered in his behalf.

REASONS FOR ALLOWANCE OF THE WRIT.

1. In permitting business records to be received in evidence upon the foundation appearing in the record of the trial proceedings, the Court of Appeals for the Ninth Circuit has given Section 1732 of Title 28 U.S.C. a construction which conflicts with opinions of this Court and with opinions of Courts of Appeal for other circuits, and which construction is not warranted by the terms of Section 1732.

2. The Court of Appeals for the Ninth Circuit sanctioned and adopted the application of an inapplicable principle of law in determining the admissibility of testimony regarding the meaning of words, symbols and initials contained in certain purported business records over petitioner's objections that such testimony was hearsay and opinion and conclusion of the witness and

in conflict with opinions of Courts of Appeal for other circuits.

3. In holding that the evidence was sufficient as a matter of law, the Court of Appeals for the Ninth Circuit has rendered a decision which is in conflict with applicable decisions of this Court and of the Courts of Appeal in other circuits.

4. In affirming the judgment of the trial Court, the Court of Appeals for the Ninth Circuit has approved instructions in a perjury case which, if permitted to remain the law of the case, will establish a dangerous precedent and a serious departure from the law heretofore applied by Courts of Appeal in other circuits in perjury cases.

5. In holding that the first count of the indictment was not duplicitous, the Court of Appeals for the Ninth Circuit has decided a question affecting Rules 7(c) and 8(a) of the Federal Rules of Criminal Procedure in conflict with prior decisions of that Court and those of the Courts of Appeals in other circuits.

ARGUMENT.

1. ADMISSION OF BUSINESS RECORDS IN EVIDENCE WITHOUT PROPER FOUNDATION.

While Exhibit No. 3 was admitted in evidence "for the limited purpose of being an exemplar of business records kept by Mr. Heller" (R. 136), the Court and, particularly the government in its closing argument treated it as though it were in evidence for all purposes to the prejudice of petitioner's case before the jury.

The only foundation with regard to Exhibit No. 3 consisted of:

1. Baskin's testimony that he had seen books *like that* before, that it was a book *of a type* used by Heller (R. 83), that he did not prepare any part of it, and that he was not the custodian of the book (R. 97);

2. Whitted's testimony that he had seen Heller work on books *like* that, that he had seen documents *of that sort,* that it was in Heller's handwriting (R. 118), but he could not say that he had seen this particular book before (R. 129);

3. Mrs. Heller's testimony that it was a record *of a type* kept by her deceased husband, that she had seen most of the record, and that it was in Heller's handwriting. (R. 135.) She did not prepare any part of Exhibit No. 3 nor did she participate in any of the transactions recorded therein. (R. 156.)

Petitioner's motion to strike (R. 172) was denied (R. 176). The Court of Appeals sustained this action of the trial Court on authority of *Harper v. United States,* 8 Cir., 1944, 143 F. 2d 795, 806. (Opinion, Arena v. U. S., page 13.)

The foundation for the admission of business records in *Harper v. United States,* supra, was based upon the testimony of the auditor and secretary of the company whose records were being offered and the entries therein were made by him personally or by bookkeepers under his supervision. In *Wheeler v. United States,* 211 F.2d 19, 23, also cited by the Court of Appeals (Arena v. U. S., Opinion, footnote, page 13), the foundation was laid by

the custodian of the record and the person who actually made the record, who testified as to the course of business in which the record was kept and the regularity thereof. In the numerous cases examined by counsel for petitioner there is not one instance of the foundation for the admission of business records being laid by a witness or witnesses who had not made the entries relevant to the inquiry, or had not supervised the making of the entries, or had not in some way been responsible for the accuracy and authenticity of the record offered.

Section 1732 of Title 28, U.S.C. was not intended to open the gate to hearsay evidence simply because it appears to be a business record. That section specifically states that such records are admissible "if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or within a reasonable time thereafter". Only a witness who could lay this minimum foundation could be examined for the purpose of showing other circumstances of the making of such record which might affect its weight as referred to in Section 1732(a) of Title 28 U.S.C., and such was the purpose of the required minimum foundation as set forth in that section.

Not one of the government's witnesses was custodian of the record received as Exhibit No. 3. Not one of the witnesses made or supervised the making of that record, nor did any one of them testify that this record was made in the regular course of business. There was no testimony as to the course of Heller's business in which this record was kept.

There is likewise a complete absence of foundation for the admission of Exhibits Nos. 2, 4, 5, 6, 7 and 8, as required by Section 1732(a) of Title 28, U.S.C.

We, therefore, respectfully submit that the decision of the Court of Appeals for the Ninth Circuit erroneously construes said Section 1732(a) and is in direct conflict with the following cases:

Palmer v. Hoffman, 318 U.S. 109, 115, 63 S.Ct. 477, 481;
Masterson v. Penn. R. Co., 182 F.2d 793, 797;
Landay v. United States, 108 F.2d 689, 704-705;
Harper v. United States, 143 F.2d 795; and
Wheeler v. United States, 211 F.2d 19, 23.

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2. TESTIMONY OF WITNESSES AS TO THE MEANING OF WORDS, FIGURES, SYMBOLS AND INITIALS IN EXHIBITS.

The Court of Appeals for the Ninth Circuit justified the admissibility of Mrs. Heller's testimony as to the meaning of words, figures, symbols and initials in Mr. Heller's purported business records on the theory that "persons familiar with given types of documents may testify as to the meaning of symbols and abbreviations used in such documents". (Arena v. U. S., Opinion, page 13.) This rationale assumes the very fact urged by petitioner as the basis for rejecting such testimony—that the witness was not familiar with the contents of the documents.

Mrs. Heller freely admitted that she did not make any of the entries in any of the exhibits (R. 154, 156, 157)

and that she had nothing whatsoever to do with any of the transactions reflected in the purported business records (R. 156, 157). In effect, Mrs. Heller's qualifications for testifying as to the meaning of the purported business entries were that she was the wife of the entrant at the time they purportedly were made and that she recognized the entrant's handwriting.

We respectfully submit that this state of the record unequivocally indicates that Mrs. Heller had no personal, first-hand knowledge as to the meaning of entries in Exhibit No. 3 about which she was permitted to testify and that she was familiar with that record only in so far as she had seen Mr. Heller make entries in a book of that type. Her information necessarily came from what was told her by someone else or by opinions formed by her observation of the records some time after the entries were made therein. Evidence having this origin is clearly hearsay or opinion and conclusion.

The Court of Appeals gave its approval to this testimony on authority of *Meyer v. Everett Pulp and Paper Co.*, 9 Cir., 1912, 193 F. 857, 862. (Arena v. U. S., Opinion, page 13.) The portion of that opinion referred to by the Court of Appeals deals with the admissibility of parol evidence in an action between parties to a contract to explain an ambiguity appearing in that contract. There is but one point of similarity between that question and the one presented herein, namely, what meaning was intended by the writer or entrant. Of course, the parties to the contract know what meaning was intended by their ambiguous written word. There the parol evidence rule is applied preliminarily to determine the propriety of re-

ceiving *competent* evidence to explain the meaning of the ambiguous writing. The question of the *competency* of the evidence offered to explain the ambiguity was not raised or discussed in the *Meyer* case, supra. Petitioner does raise the question of Mrs. Heller's competency to testify as to the intended meaning of words, initials and symbols which were never used by her (R. 139) and which reflect matters and transactions not participated in by her (R. 156). Petitioner can only conclude that Mrs. Heller's testimony as to these matters was hearsay or opinion and conclusion, and, therefore, that the Court of Appeals applied an improper principle of law in determining the competency of Mrs. Heller's testimony as to the meaning intended by the entrant, Mr. Heller (R. 135) of words, initials and symbols contained in Exhibit No. 3.

Mrs. Heller was likewise improperly permitted to testify with respect to Exhibits Nos. 3, 4, 5, 6, 7 and 8.

See:

United States v. Quick, 3 Cir., 128 F.2d 832, 838;

Fox v. Order of United Commercial Travelers, 5 Cir., 1952, 192 F.2d 844, 846;

Southern Ry. Co. v. Mooresville Cotton Mills, 4 Cir., 187 F. 72, 73;

Phillips & Benjamin Co. v. Ratner, 2d Cir., 206 F.2d 372, 375-376;

Harper v. United States, 8th Cir., 143 F.2d 795, 805.

3. SUFFICIENCY OF THE EVIDENCE AS A MATTER OF LAW TO SUSTAIN THE VERDICT OF THE JURY IN A PERJURY CASE.

Mr. Baskin testified that he delivered $38,000.00 to petitioner in the presence of a teller, Herman Wirth, at a bank in Oakland, California (R. 95, 96). This is the testimony which directly contradicts petitioner's testimony to the Grand Jury that he did not receive $38,000.00 from Mr. Baskin at a bank in Oakland. It is that testimony which must be corroborated.

Mr. Whitted's testimony establishes that petitioner placed bets with Heller from 1941 through October, 1947; that during 1945, 1946 and through October, 1947, petitioner placed bets with Heller on Mr. Samish' behalf (R. 122); and that he had seen Mr. Heller make cash settlements with petitioner on numerous occasions at Heller's office (R. 129).

Mrs. Heller's testimony establishes that petitioner placed bets on behalf of Mr. Samish during business transactions at the Heller home (R. 152, 154).

Mr. Madeiros' testimony and Exhibits 11 and 12 establish that on December 4, 1947, $38,000.00 in cash was paid by the teller, Herman Wirth, at the Bank of America, Twelfth and Broadway, Oakland, California, in exchange for four checks, one of which was drawn on the account of Z. S. Heller and the other three being payable to T. Heller (R. 160, 161), and that the check drawn on Z. S. Heller, Exhibit No. 8, was endorsed by Irving Baskin (R. 164).

This résumé petitioner believes to be an honest presentation of the evidence which corroborates the testimony of the direct witness, Irving Baskin, up to the point of

his cashing of the checks and receipt of the $38,000.00, but it does not progress to the point of contradicting petitioner's testimony before the Grand Jury that he had not received $38,000.00 from Baskin at a bank in Oakland. Thus there is a total absence of evidence to corroborate Baskin's testimony that he gave thirty-eight one thousand dollar bills to petitioner at a bank in Oakland. The evidence is consistent with the fact that it was Baskin's practice to return cash received at the bank to Mr. Heller (R. 126).

Petitioner asserts that there is a complete absence of proof tending to connect him with Irving Baskin on December 4, 1947, or tending to place him at or near the Bank of America, Twelfth and Broadway, Oakland, California, on that day, or tending to prove that he received or had in his possession a sum of money approximating $38,000.00 on or about December 4, 1947.

The Court of Appeals held that Baskin's testimony was sufficiently corroborated to support the verdict and judgment of the trial Court (Arena v. U. S., Opinion, page 11). In so doing that Court resorted to an unprecedented line of reasoning which terminated in an application to this, a perjury case, of those principles which are applied to test the admissibility in evidence of an admission or confession of the accused in any criminal trial upon sufficient proof of the corpus delicti. Of course, in a case of that nature the independent evidence of the corpus delicti may be considered as substantive evidence by the jury along with the confession or admission to determine the defendant's guilt beyond a reasonable doubt. But for example, where the defendant's

admission by flight from the scene of the crime is before the jury, the other evidence need not corroborate this evidence, but need only tend to show that the offense charged was in fact committed. Likewise, it is not required that evidence of the confession or admission emanate from a source independent of that from which other proof of the corpus delicti is produced. This is amply demonstrated in a burglary case where the arresting officer testifies as to facts from which the commission of the crime may be inferred and then upon that proof of the corpus delicti the officer is permitted to testify as to admissions or a confession of the defendant to the officer at the time of the arrest at the scene of the crime. Surely it cannot be pretended that a conviction would not be sustained in the burglary case upon the testimony of this one witness. Upon the reasoning of the Court of Appeals in the instant case a conviction of perjury may likewise be sustained upon the testimony of one witness.

The requirement of corroboration in perjury cases has been dealt with in numerous decisions. *Falsity* is the corpus delicti in perjury. *Hammer v. United States,* 271 U.S. 620, 629, 46 S.Ct. 603, 605. It is well-established that the alleged falsity (the corpus delicti) must be proven by at least two witnesses or one witness and independent corroborating circumstances. *United States v. Wood,* 1840, 14 Pet. 430, 440. This general rule has been analyzed and particularized as requiring that where there is but one direct witness, the corroborating evidence must be independent of the direct witness, it must be corroborative of that testimony of the direct witness

which contradicts the alleged perjurious statements and it must be inconsistent with the innocence of the defendant, i.e., it must bear upon the falsity of the alleged perjurious statement.

See:

United States v. Neff, 3 Cir., 212 F.2d 297, 306;
United States v. Palese, 3 Cir., 133 F.2d 600, 603;
United States v. Seavey, 3 Cir., 180 F.2d 837, 839;
Radomsky v. United States, 9 Cir., 180 F.2d 781.

The error of the Court of Appeals in failing to apply the above-stated well-established principles is readily apparent when compared with those principles which were taken by the Court of Appeals from cases dealing with the admissibility of an admission or confession of the defendant in any criminal case, as follows:

"*. . . here it is established that the evidence corroborating a confession of the defendant need not independently prove the commission of the crime charged, neither beyond a reasonable doubt nor by a preponderance of proof.*" *Davena v. United States*, 9 Cir., 1952, 198 F.2d 230, 231. (Arena v. U.S., Opinion, page 10.)

"*Independently they need not establish the truth of the corpus delicti at all, neither beyond a reasonable doubt nor by a preponderance of proof.*" *Daeche v. United States*, 2 Cir., 1918, 250 F. 566, 571-572. (Arena v. U.S., Opinion, page 10.)

"*. . . , we think the better rule to be that the corroborative evidence need not be sufficient, independent of the statements, to establish the corpus delicti.*" *Opper v. United States*, 1954, 348 U.S. 84, 92, 93. (Arena v. U.S., Opinion, page 9.)

The principles applied by the Court of Appeals overlook the underlying reasons for the rule requiring corroboration of the direct witness, i.e., hostility and resentment motivating an adverse witness to testify falsely or his faulty memory. Under the principles applied by the Court of Appeals, a perjury conviction could be sustained if the direct witness was corroborated in all of his testimony on collateral matters even though there was no independent evidence remotely bearing upon that part of his testimony which conflicted with the alleged perjurious statement. If this were the law perjury convictions could be sustained upon the uncorroborated testimony of one witness who contradicted the alleged false statement of the defendant. Such is not the law as heretofore decided by this Court and by Courts of Appeal of other Circuits.

See also:

United States v. Rose, 3 Cir., 215 F.2d 617, 624-625;
Miranda v. United States, 196 F.2d 408, 411;
McWhorter v. United States, 193 F.2d 982, 983, 985.

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4. THE COURT OF APPEALS ERRED IN APPROVING THE INSTRUCTIONS GIVEN BY THE TRIAL COURT AS TO THE CORROBORATION REQUIRED IN PERJURY CASES.

The error of the Court of Appeals in regard to the instructions given by the trial Court, as in determining the sufficiency of the evidence as a matter of law, originated in its application of the principles applicable to confession and admission cases. In its opinion, at page 15, the Court of Appeals states:

> "One requested instruction contains the statement that the corroborating evidence must be 'inconsistent

with the innocence of the defendant'. We have already seen that the weight of authority is opposed to so severe a standard for the corroborating evidence. It is sufficient if the corroborating evidence *tends* to establish the defendant's guilt, and if such evidence *together with* the direct evidence is 'inconsistent with the innocence of the defendant'."

Petitioner contends that the weight of authority is not opposed to the principle that in perjury cases the corroborating evidence must be inconsistent with the innocence of the defendant.

The instructions which were approved by the Court of Appeals, in so far as they deal with corroborating evidence, are as follows:

"The uncorroborated testimony of one witness is not enough to establish the falsity of the testimony of the defendant. The falsity must be evidence (sic) by the testimony of two independent witnesses, or by one witness and corroborating evidence. In the absence of such proof the defendant must be acquitted.

"*By corroborative evidence is meant evidence independent of the testimony of a single witness under oath which substantiates the testimony of that witness. That evidence must be trustworthy. A document such as a bank record or check or business record may constitute corroboration, if you find that it substantiates the testimony of the witness who testified directly as to the falsity of the defendant's statement and is trustworthy.*" (R. 230 and page 16 of the Opinion of the Court of Appeals.)

Petitioner took proper exception to the italicized portion of the instructions (R. 233, 234), which purport to

spell out the meaning of the term "corroborative evidence" and respectfully contends that this portion of the instructions is erroneous in that it does not require corroboration of the direct witness in that part of his testimony which contradicts the alleged perjurious statement, i.e., it need not touch the alleged *falsity* of the defendant's statement.

That the Court of Appeals adhered to this view is manifested by its opinion, wherein at page 11, it states:

> ". . . The short answer to the appellant's objection is that, as we have seen (referring to Warzower v. U. S., 1941, 312 U.S. 342, 347-348), the Supreme Court has recognized the cognation between corroboration in confession cases and corroboration in perjury prosecutions. In *neither* case need the corpus delicti be proved by the corroboration, independently of the confession or the testimony of the single witness."

Petitioner's contention was clearly expressed by the Court in *United States v. Neff*, supra, 306, 307, as follows:

> "• • • Where the government seeks to establish perjury by the testimony of one witness and corroborating evidence, the latter must be independent of the former *and inconsistent with the innocence of the defendant.* 'When the courts speak of corroborative evidence they mean *evidence aliunde*—evidence which tends to show the perjury independently.' • • • Where corroborative evidence is offered the Court must rule, as a matter of law, whether it is sufficient —that is, whether the corroborative evidence, if true, substantiates the testimony of the single witness who has sworn to the *falsity* of the alleged perjurious statement." (Italics supplied.)

See also:

McWhorter v. United States, 5 Cir., 193 F. 982, 985;
United States v. Hiss, 2 Cir., 185 F.2d 822, 824;
Fraser v. United States, 6 Cir., 145 F.2d 145, 151;
United States v. Buckner, 2 Cir., 118 F.2d 468;
United States v. Rose, 3 Cir., 215 F.2d 617, 624-625.

The variance between the instructions as given on this point and the law as to what constitutes corroborative evidence is obvious, particularly when considered with regard to the purpose of the 'two witness' rule. The instructions given *place emphasis upon corroboration of the testimony of the witness or evidence to substantiate his testimony.* Pursuant to this type of instruction a jury could properly find corroboration of the testimony of a single direct witness even though not one scintilla of corroborating evidence has been offered to prove the alleged *falsity* of the defendant's statement. It permits a conviction on corroboration of collateral matters testified to by the direct witness. Such is not the law.

The error was aggravated by the example given by the Court below when in its instruction it said, "such as a bank record or check or business record." This example more than anything petitioner could say proves the error of the Court's instruction.

In this case, Exhibit No. 11 could very well corroborate Mr. Baskin's testimony as to the *receipt* of $38,000 in cash, but it is not corroboration of the *disposition* of the cash, turning over of $38,000 by Baskin to petitioner. The falsity herein alleged is not Baskin's receipt of the $38,000, but the turning over by him of $38,000 in one thousand dollar bills to petitioner; hence, the jury under

the Court's erroneous instruction, could very well conclude that Baskin was corroborated by the bank records as to the receipt of the $38,000 and believing this was corroboration could find petitioner guilty without ever appreciating that the fact requiring corroboration was the turning over of the money by Baskin to petitioner.

A stronger case of prejudice could not be made out.

The cases cited by petitioner are clear in stating that the corroborating evidence must bear upon the *falsity* of the testimony of the defendant independent of the testimony of the direct witness. These cases place emphasis upon *proof of the falsity of the defendant's testimony* as contrasted with the general corroboration of the direct witness as called for by the trial Court's instruction.

Assuming the propriety of the first part of the Court's instruction (that which preceded the objectionable instruction), the influence which the latter instruction had upon the minds of the jurors must not be underestimated for as was said in *Bollenback v. United States,* 326 U.S. 607, 66 S.Ct. 402, 405,

> "• • • 'The influence of the trial judge on the jury is necessarily and properly of great weight,' Starr v. United States, 153 U.S. 614, 626, 14 S.Ct. 919, 923, 38 L.Ed. 841, and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge."

And later the Court said,

> "A conviction ought not to rest on an equivocal direction to the jury on a basic issue."

Certainly the trial Court's instructions as to corroboration were equivocal. That portion of the instruction which deals specifically with corroborative evidence is a glaring misstatement of the law. When considered with regard to the general instruction immediately preceding it and the great emphasis placed upon the necessity for corroborative evidence by respective counsel in their arguments to the jury (R. 185, 186, 187, 188, 189, 190, 191, 192, 197, 202, 205, 206, 208, 209, 210, 211, 213, 214, 215, 217, 218, 221) we must logically conclude that the jurors were eager to be enlightened as to what specifically constitutes corroborative evidence. The above-quoted portion of the instructions of the Court below was food for their hungry minds. We cannot but believe that with this equivocal (and we submit, erroneous) instruction the jurors were left to their deliberations with a clear misstatement of the law to guide them on a vital issue. It would be pure fantasy to conclude that the jurors did not rely upon this erroneous instruction in arriving at their verdict of guilty.

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5. THE FIRST COUNT OF THE INDICTMENT WAS DUPLICITOUS IN THAT IT ALLEGES MORE THAN ONE OFFENSE IN A SINGLE COUNT.

Petitioner respectfully submits that the cases of *Cornes v. United States,* 9 Cir., 1941, 119 F.2d 127, 129, and *Greenbaum v. United States,* 9 Cir., 80 F.2d 113, 116, cited by the Court of Appeals in its opinion at page 14 in support of its conclusion that the indictment charges only one offense have no application and should be distinguished from an indictment in any perjury case for the reason that the only act of the accused which need be set

forth is the precise statement which is alleged to be false, and for the further reason that the offense of perjury is complete each time that a witness under oath swears falsely to any distinct, separate and material matter as to which he is examined. Of necessity indictments under Section 338 of Title 18 U.S.C., as are involved in the *Cornes* and *Greenbaum* cases (supra), must set forth a minimum of detail as to *how the fraudulent scheme was executed.* Such is not the requirement in perjury cases.

A review of the allegations of the first count of the indictment, which are set forth in full at pages 3-5, inclusive, of the Transcript of Record, clearly shows that five separate offenses were charged in one count. They are:

"One

"Q. I see. On this occasion Mr. Baskin says you accompanied him to the bank while he proceeded to cash some checks in return for which there were 38 one thousand dollar bills which were obtained from the bank, and that the teller counted that $38,000 out in your presence to him and he in turn counted the $38,000 in these one thousand dollar bills to you and give you the bills.

A. I didn't get them, sir.

Q. Did that happen?

A. No, sir.

Q. Anything like it?

A. No, sir.

"Two

Q. Did you ever go there to the bank with this Baskins?

A. No. but I was in that bank most every single day in my own business. I have seen and been in there dozens of times, I will say, but I am always in

that bank every single day ever since I had my liquor business, that is where I used to bank.

"Three

Q. Has Mr. Baskin ever delivered any money to you?

A. No, sir.

Q. Even one cent?

A. Never had occasion to.

"Four

Q. Your testimony is that on no occasion did anyone ever pay you any amount of money, one dollar or $38,000 to be delivered to you personally as your own money or on behalf of Mr. Samish or anyone else?

A. That's correct, Mr. Burke.

"Five

Q. (By the Foreman) Did you ever do any business with Mr. Baskin or have any transaction with Mr. Baskin in any bank in Oakland?

A. I do not, sir." (R. 4-5.)

Under Section 1621 of Title 18 U.S.C. a witness commits the crime of perjury *each time* he states *any* material matter which he does not believe to be true. This principle was clearly stated in *United States v. Cason,* D.C. La., 39 F.S. 731, 734, wherein the Court said,

> "The defendant, as a witness before the Grand Jury, was bound to tell the truth, and each time he wilfully and corruptly swore falsely as to any distinct, separate and material matter under investigation, of which a Federal Court had jurisdiction, it constituted a separate offense of perjury."

Applying the test prescribed in *Dimenza v. Johnston,* 9 Cir., 130 F.2d 465, 466 and *Carpenter v. Hudspeth,* 10 Cir.,

112 F.2d 126, 127, that the determination of whether more than one offense is charged in an indictment depends upon whether or not each offense requires proof of some fact which the others do not, we find that in the instant case proof of the falsity of number two above does not necessarily require proof of facts essential to the proof of the falsity of any one of one, three, four or five above.

Thus, if it were established that the defendant went to the bank with Mr. Baskin (two above) it would not necessarily prove that he received any money from Mr. Baskin (three above) and particularly it would not necessarily prove that he received 38 $1,000 bills from Mr. Baskin (one above) and, conversely, proof that appellant had received $38,000 from Mr. Baskin would in no way prove that appellant had gone to the bank with him. Similarly, proof of the falsity of No. Four above does not necessarily require proof of facts essential to the proof of any one of One, Two, Three or Five above and proof of the falsity of Five above does not necessarily require proof of facts essential to the proof of any one of One, Two, Three or Four above.

Clearly, this indictment presents a situation wherein two or more offenses are alleged in one count. Each of the five matters of inquiry were material to the broad investigation then being conducted by the Grand Jury, yet each was directed to a distinct and separate matter within the knowledge of appellant.

The Circuit Court of Appeals for the Eighth Circuit, in *Seymour v. United States,* 77 Fed. 2d 577, dealt with the reverse situation. In that case appellant was sworn and

testified before a Senate Committee investigating campaign expenditures in connection with the election of a United States Senator. The answers given by appellant in the course of his testimony became the basis of eight counts of an indictment, each of which charged him with perjury. After conviction on five counts, appellant took an appeal in which he contended that but one crime was charged in the several counts and that all the questions and answers assigned as perjury should have been put into one count. The Court refuted this contention in the following language at page 181:

> "• • • Neither the circumstances that all referred to the *same general subject of inquiry* or that all were made *at the same hearing* prevents each from being a separate and distinct crime punishable as such. The commission of perjury as to one matter does not absolve the witness or afford him immunity as to all other matters covered by his testimony at the same hearing. The obligation to testify truly and the penalty for false swearing is present as to every material answer given by him. While there is a sound discretion as to such matters in the trial court (Pointer v. United States, 151 U.S. 396, 14 S.Ct. 410, 38 L.Ed. 208; Morris v. United States, 161 F. 672 (C.C.A. 8)), it would seem there would have been more ground for attacking the indictment as duplicitous had all of these matters been joined in one count than there is to attack the statement in separate counts." (Italics supplied.)

See also:

United States v. Orman, 3 Cir., 207 F.2d 148, 160;
United States v. Emspack, D.C., D.C., 95 F.Supp. 1012, 1016.

We, therefore, respectfully submit that the first count of the indictment is duplicitous and that the trial Court should have granted the motion to dismiss this count of the indictment. (R. 12-15.) For the same reasons the trial Court should have granted the motion in arrest of judgment. (R. 31.) Both motions were timely made and strenuously urged.

CONCLUSION.

For the foregoing reasons, we respectfully submit that the Petition for Writ of Certiorari should be granted.

Dated, San Francisco, California,
December 2, 1955.

ALFONSO J. ZIRPOLI,
Attorney for Petitioner.

C. HAROLD UNDERWOOD,
Of Counsel.

(Appendix Follows.)

Appendix

United States Court of Appeals
for the Ninth Circuit

James Arena, Appellant, vs. United States of America, Appellee.	No. 14,516 Oct. 5, 1955

Appeal from the United States District Court for the Northern District of California, Southern Division

Before: DENMAN, Chief Judge, and ORR and LEMMON, Circuit Judges.

LEMMON, Circuit Judge:

In a perjury case, the rule requiring corroboration of a single witness as to the falsity of the defendant's testimony is, like Iago's wine, "a good familiar creature, if it be well used."[1]

But when the rule is perverted so as to require the prosecution to "prove its case twice", it cannot be said to be "well used".

The appellant, however, professes that he "does not contend that the government should be compelled to prove its case twice". He also complains that "Appellee's brief

[1] *Othello* II iii 313-314.

incorrectly attributes to appellant the proposition that 'the corroborative evidence must "of itself" prove guilt' ". Yet such double proof is precisely what the appellant exacts of the appellee when he says:

> "The asserted corroborative evidence in the instant case is not direct or positive or inconsistent with the innocence of the accused. *It does not 'of itself' prove guilt.*" (Emphasis supplied)

The law does not demand of the appellee so inordinate a measure of proof.

1. *Statement of the Case*

The indictment charged the appellant in two counts with violations of 18 USCA Sec. 1621, infra. The District Court entered a judgment of acquittal on the second count. The charging part of the first count is set out in full in the margin.[2]

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[2] "(3) That on May 6, 1953, at San Francisco, . . . (the appellant) . . . wilfully, knowingly, and contrary to his oath, testified in a material matter, in answer to questions propounded at (certain grand jury) proceedings, as follows:

"Q. (By Mr. Olney): I see. On this occasion Mr. Baskin says you accompanied him to the bank while he proceeded to cash some checks in return for which there were 38 one thousand dollars (sic) bills which were obtained from the bank, and that the teller counted that $38,000 out in your presence to him and he in turn counted the $38,000 in these one thousand dollars (sic) bills to you and give (sic) you the bills. A. I didn't get them sir.

"Q. Did that happen? A. No sir.

"Q. Anything like it? A. No sir.

"Q. Did you ever go there to the bank with this Baskins (sic)?

"A. No, but I was in that bank most every single day in my own business. I have seen and been in there dozens of times, I will say, but I am always in that bank ever since I had my liquor business, that is where I used to bank.

The jury found that appellant was guilty on the first count, and he received a sentence of three years' imprisonment.

Section 1621, the perjury statute, reads as follows:

"Who ever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both."

"Q. Has Mr. Baskin ever delivered any money to you? A. No sir.

"Q. Even one cent?

"A. Never had occasion to.

"Q. (By Mr. Burke): Your testimony is that on no occasion did anyone ever pay you any amount of money, one dollar or $38,000 to be delivered to you personally as your own money or on behalf of Mr. Samish or anyone else?

"A. That's correct, Mr. Burke.

"Q. (By the Foreman): Did you ever do any business with Mr. Baskin or have any transaction with Mr. Baskin in any bank in Oakland?

"A. I did not, sir.

"Q. And you never received $38,000 from Mr. Baskin? A. No sir.

"(4) That in truth, as the defendant James Arena then and there well knew and believed, the foregoing testimony was false.

"(5) That the questions asked and the testimony of the defendant, heretofore alleged, were material to the proceedings then being conducted by the Grand Jury, and the testimony of the said defendant, by reason of its falsity and known untruthfulness, so known to the defendant, did thereby impede and dissuade the Grand Jury in performing an expeditious inquiry."

2. *The Facts*

The appellant did not take the witness stand and no evidence was offered in his behalf. Since one of the errors specified by him is that "The evidence was insufficient as a matter of law to sustain the verdict", in considering the facts we must grant every reasonable intendment in favor of the appellee.

Irving Baskin testified that in Oakland, California, he was employed part time by Zola S. ("Tiny") Heller, in taking care of the records of the latter's "legitimate businesses"—"a hotel and a bar and a liquor store". Heller was also a "betting commissioner", defined by the witness as "a person that takes wagers". Baskin also prepared Heller's tax returns, did his banking for him, obtained information from him regarding "the betting commission operations", examined the "betting commission" records, recognized Heller's handwriting therein, etc.

Baskin had known the appellant since 1941 or 1942. The appellant was in the Heller establishment during the end of Heller's operations in 1947 three or four times a week. On two or three occasions, the witness was handed sealed envelopes by Heller for delivery to the appellant at the latter's liquor store. The witness would deliver the envelopes.

In early December, 1947, Heller, in the appellant's presence, handed Baskin a group of checks and told him to "get them cashed into one thousand dollar bills and then give them to Jimmy (the appellant)". The checks amounted to $38,000.

The appellant and Baskin left Heller's liquor store and went to the bank, about two blocks away. They stepped to the window of Herman Wirth,[3] a teller, who counted out thirty-eight one-thousand-dollar bills to Baskin.

Baskin's precise testimony at this crucial point is as follows:

> "I gave (the checks) to Mr. Worth (sic). Mr. Worth took them to the Chief Clerk to get them okayed. . . . his name was Madeiras. • • •
>
> "Mr. Worth came back to his cage and he got all the thousand dollar bills he had, there wasn't enough bills, so he asked Mr. Seale for his thousand dollar bills. Between the both they scraped up 38 one thousand dollar bills. • • •
>
> "We went to the back of the bank. . . . We both stayed on the other side. . . . Mr. Worth was behind the counter. . . .
>
> "I told Mr. Worth to count the money out in stacks of ten, with eight being the last one. I wanted to make sure all the money was there. And Mr. Worth counted the money out in stacks, three stacks of ten each and one of eight. Then I called Mr. Arena over and I counted the money over to him. He took the money, put it in his pocket. . . . We both walked out of the bank. . . ."

The next witness was F. W. Whitted. He was employed by Heller from April, 1941, until the end of October, 1947. His duties were to "make the prices" on base-

[3]Wirth's surname also appears as "Worth" in the record, but a "teller's pay proof", which is an exhibit in this case and which apparently contains his signature, gives 'Wirth'.

ball games; that is to say, to determine the odds on a particular game.

The appellant was on Heller's premises "five or six times a week at least" during the period in which Whitted was associated with Heller. In 1946 and 1947 the appellant placed bets ranging "from $100 to two or three thousand dollars". The witness sometimes recorded the appellant's bets. Five cards or "parlay tickets" admitted in evidence showed that the appellant had won $7900 in one transaction, on October 26, 1946.

The foregoing bet, however, was placed by the appellant on behalf of Arthur H. Samish, whose income tax liability was being investigated by the grand jury before which the appellant is charged to have sworn falsely. At first, Samish placed his own bets, but later the appellant did so. When the appellant placed the bets, the bettor was designated in Heller's books as "SA"; when Samish himself did the placing, the designation was "AS". Whitted recorded transactions on behalf of Heller.

Heller's widow testified that she recorded bets for her husband. He conducted his betting activities at home as well as in his office behind the liquor store. She identified a number of his business papers as being in his own handwriting. She testified that in her husband's books the initials "S.A." meant "Artie Samish Account to James Arena (the appellant)".

She identified a document containing wagers for Samish for the week ending November 30, 1947, showing that the latter won $34,800. She explained that the "remarks" in connection with a check dated December 3, 1947—"S.A."

"A.C.T."—indicated "Artie Samish account". The check was for $6,050.

Earl Madeiros,[4] assistant cashier of the Twelfth and Broadway branch of the Bank of America in Oakland, said that in December of 1947, the paying teller presented to him four checks for approval for cashing. The checks totaled $38,000. Not being entirely familiar "with all the procedures on Tiny Heller's operation", he referred the matter to a senior officer of the bank, and when the latter gave him the "nod", Madeiros approved the checks and handed them back to the teller for cashing. Wirth was the teller.

The checks were for $6,050, $13,700, $9,350, and $8,900.

Finally, there was read to the jury a portion of the transcript of the appellant's testimony before the Grand Jury on May 6, 1953. In that testimony the appellant declared that he knew nothing about five "Sacramento Football Selections" cards for Saturday, October 26, 1946, all bearing the initials "J.A." He also denied that he had placed the bets represented by the cards, denied that he had placed the bets with Whitted, and expressed the belief that he had never placed any bets with the latter.

It will be recalled that Whitted testified that in 1946 and 1947 the appellant placed bets ranging in size from $100 to $2,000 or $3,000. Whitted also identified five

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[4]Here again there is a conflict in the record, which also shows the spelling to be "Madeiras". The latter form contains the more likely Portuguese diphthong, although the ending "as" is doubtful. The name is probably "Madeiros".

"parlay cards" that he had written, showing the appellant as the bettor who won $7,900 in that transaction.

3. *There was Sufficient Corroboration of the Direct Testimony of Baskin.*

In open court, counsel for the appellant stipulated that the latter's testimony was "material to the proceedings before the Grand Jury". It is also conceded that there was "direct evidence"—albeit it is asserted to be "The only direct evidence"—offered by the government to show the alleged falsity of appellant's statements, if believed"; namely, "the testimony of Irving Baskin that early in December, 1947, he went to a branch of the Bank of America in Oakland accompanied by appellant and there cashed four checks for which he received thirty-eight one thousand dollar bills from the teller, Herman Wirth, which he (Baskin) then and there counted out and turned over to appellant."

There remains, however, a final factual question that must be resolved by this Court:

Was Baskin's testimony sufficiently corroborated to support the verdict and the judgment below?

The problem is a unique one, confined almost exclusively to the law of perjury. In Weiler v. United States, 1945, 323 U.S. 606, 608-609, the Court said:

> "The special rule which bars conviction for perjury solely upon the evidence of a single witness is deeply rooted in past centuries."

The rule has been sharply criticized by some courts and some text writers. It has been pointed out, for example,

that it is inconsistent to rule that evidence sufficient to warrant the death penalty for murder is insufficient to convict a man of perjury.[5]

Nevertheless, the doctrine has been approved by the Supreme Court. This acceptance, however, has been qualified by certain clear and definite restrictions and limitations, which it now behooves us to examine and to apply to the instant case.

The leading case, not cited in the briefs, in which the rule and its confines were discussed is United States v. Wood, 1840, 14 Pet. 430, 440. There the Court said:

> "There must, then, be two witnesses, or one witness corroborated by circumstances proved by independent testimony. If we will but recognize the principle upon which circumstances in the case of one witness are allowed to have any weight, that principle will carry us out to the conclusion that circumstances, without any witness, when they exist in documentary or written testimony, may combine to establish the charge of perjury; as they may combine, altogether unaided by oral proof, except the proof of their authenticity, to prove any other fact connected with the declarations of persons or business of human life."

But even where the rule requiring corroboration in perjury cases is applicable, it does not purport to prescribe the *quantum* of corroboration. Citing the *Wood* case, supra, the Supreme Court, in Hammer v. United States, 1925, 271 U.S. 620, 627, pointed out:

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[5]See United States v Palese, 3 Cir., 1943, 133 F 2d 600, 602; United States v Marachowsky, 7 Cir., 1953, 201 F 2d 5, 11, certiorari denied, 1953, 345 U.S. 965; Marvel v State (Del.), 1925, 131 A. 317, 42 A.L.R. 1058, 1060, 1062; Wigmore on Evidence 3 ed., 1940, vol. vii, Secs. 2040-2041, pages 273-277.

> "That case shows that the rule, which forbids conviction on the unsupported testimony of one witness as to falsity of the matter alleged as perjury, *does not relate to the kind or amount of other evidence required to establish that fact.*" (Emphasis supplied)

This same liberal canon has been applied by this and other courts of appeals. In Doan v. United States, 9 Cir., 1953, 202 F 2d 674, 680, we said:

> "The rule relating to the corroboration which is required in a case of this kind (a perjury and subornation case), is stated by Mr. Wigmore as follows: 'As to the nature of the corroboration, no detailed rule seems to have been laid down, nor ought to be laid down. The jury should be instructed not to convict unless the testimony of the principal witness has been so corroborated that they believe it to be true beyond a reasonable doubt.' Wigmore, 3d Ed., sec. 2042. 'The sufficiency of the corroboration is, of course, a question for the jury.' (Case cited)"

Adverting to the ancient rule that required *two* witnesses, the Court in Hashagen v. United States, 8 Cir., 1909, 169 F 396, 399, said:

> "But this strictness has long since been relaxed, and we find many cases in the books where convictions have been sustained upon the testimony of a single witness, corroborated by circumstances proved by independent evidence sufficient to warrant the jury in saying that they believe one rather than the other. In other words, the evidence of the witness, together with the other facts and circumstances proved on the trial, must be something more than sufficient to counterbalance the oath of the defendant and the legal presumption of his innocence."

In Marvel v. State, supra, 42 ALR at page 1062, the Supreme Court of Delaware observed:

> "Almost all of the modern authorities hold that the corroborating evidence need not be the equivalent of another direct witness, but that it suffices if any material circumstances be proved in confirmation."[6]

The Supreme Court has related an uncorroborated confession to the testimony of a single prosecution witness in a perjury case. In Warszower v. United States, 1941, 312 U.S. 342, 347-348, the Court used the following language:

> "An uncorroborated confession *or evidence of perjury,* given by one witness only, does not as a matter of law establish beyond a reasonable doubt the commission of a crime, but there are exceptions to the normal requirement that disputed questions of fact are to be submitted to the jury under appropriate instructions." (Emphasis supplied)

Accordingly, we advert to the decisions dealing with the quantum of corroboration required in confession cases.

In Opper v United States, 1954, 348 U.S. 84, 92, 93, the Supreme Court stated:

> "We next consider the extent of the corroboration of admissions necessary as a matter of law for a judgment of conviction. * * * Each case has its own facts admitted and its own corroborative evidence, which leads to patent individualization of the opinions. *However, we think the better rule to be that the corroborative evidence need not be sufficient, independent of the statements, to establish the corpus delicti.* It is necessary, therefore, to require the Government to introduce substantial independent evi-

[6]See also Wharton, *infra,* Sec. 1585, pp. 1839-1840.

dence which would *tend* to establish the trustworthiness of the statement." (Emphasis supplied)

In Mangum v United States, 9 Cir., 1923, 289 F. 213, 216, a frequently cited case, this Court affirmed a judgment by District Judge Sawtelle, who later became a member of the Court of Appeals. In that case the following language was used:

"Evidence aliunde, however, as to the corpus delicti, need not be such as to alone establish the fact beyond a reasonable doubt. It is sufficient if, when considered in connection with the confession, it satisfies the jury beyond a reasonable doubt that the offense was in fact committed, and the plaintiff in error committed it. (Cases cited.)"

During the intervening third of a century, the doctrine in the *Mangum* case has been endorsed by this and other appellate courts. A recent expression is that by Chief Judge Denman in Davena v United States, 9 Cir., 1952, 198 F 2d 230, 231, certiorari denied, 1952, 344 U.S. 878:

"It is now urged upon us that these extrajudicial statements of the defendant were improperly admitted into evidence because the crime was not proved independently of them, and thus that United States v Fenwick, 7 Cir., 177 F 2d 488 requires a reversal. Whatever vitality the Fenwick case has in the light of United States v Hornstein, 7 Cir., 176 F 2d 217 which preceded it and appears to be in conflict, and United States v Yeoman-Henderson, Inc., 7 Cir., 193 F 2d 867, which strictly limits the Fenwick case, *it is of no relevance in this circuit since here it is established that the evidence corroborating a confession of the defendant need not independently prove the commission of the crime charged, neither beyond a reason-*

able doubt nor by a preponderance of proof." (Emphasis supplied)

This view has received distinguished support elsewhere. After stating the older and narrower view that the corpus delicti must be established independently of the confession, Judge Learned Hand, in Daeche v United States, 2 Cir., 1918, 250 F. 566, 571-572, commented:

> "But such is not the more general rule, which we are free to follow, and under which any corroborating circumstances will serve which in the judge's opinion go to fortify the truth of the confession. Independently *they need not establish the truth of the corpus delicti at all, neither beyond a reasonable doubt nor by a preponderance of proof.* (Many cases cited)" (Emphasis supplied)[7]

The appellant vigorously rejects the authority of confession cases in perjury prosecutions, arguing that "where the evidence emanates directly from the defendant the rule generally applied in perjury cases has been relaxed". While it is true that a defendant's own confession is usually more impressive than the accusatory testimony of a disinterested witness, the difference goes merely to the

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[7]See also Pearlman v United States, 9 Cir., 1926, 10 F 2d 460, 462; Wynkoop v United States, 9 Cir., 1927, 22 F 2d 799; Aplin v U.S., 9 Cir., 1930, 41 F 2d 495, 496; Wiggins v United States, 9 Cir., 1933, 64 F 2d 950, 952, certiorari denied, 1933, 290 U.S. 657; Chevillard v United States, 9 Cir., 1946, 155 F 2d 929, 935; Adolfson v United States, 9 Cir., 1947, 159 F 2d 883, 887-888, certiorari denied, 1947, 331 U.S. 818; Iva Ikuko Toguri D'Aquino v United States, 9 Cir., 1951, 192 F 2d 338, 357, certiorari denied, 1952, 343 U.S. 935, rehearing denied, 1952, 343 U.S. 958, motion for leave to file a second petition for rehearing denied, 1953, 345 U.S. 931; Oldstein v United States, 10 Cir., 1938, 99 F 2d 305, 306.

weight of the two types of evidence and not to the *legal sufficiency* of the corroboration.

At any rate, the short answer to the appellant's objection is that, as we have seen, the Supreme Court has recognized the cognation between corroboration in confession cases and corroboration in perjury prosecutions. In *neither* case need the corpus delicti be proved by the corroboration, independently of the confession or of the testimony of the single accusing witness.

While vehemently insisting upon the necessity of corroboration in a perjury case, the appellant is extremely hypercritical of the appellee's efforts to satisfy that necessity. For instance, two specified errors are that the court below admitted the testimony of Whitted and Mrs. Heller, it being asserted that these witnesses were "permitted to testify as to transactions and conversations with the appellant completely unrelated in time or event to the transactions involved in the alleged perjurious statement," etc.

We know of no such rigid limitation of time or place in connection with the evidence of corroboration, so long as the factual relation is logical and reasonable. The authorities agree that the corroborative evidence need only "tend" to show that the defendant is guilty of perjury.[8]

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[8]See also Miranda v United States, 9 Cir., 1952, 196 F 2d 408, 411, certiorari denied, 1952, 344 U.S. 842; McWhorter v United States, 5 Cir., 1952, 193 F 2d 982, 985; United States v Messanbaum, 3 Cir., 1953, 205 F 2d 93, 95, note 4; and United States v Neff, 3 Cir., 1954, 212 F 2d 297, 307, heavily relied upon by the appellant.

We have already set out a summary of the testimony in the instant case. We believe that there was sufficient evidence, both oral and documentary, to corroborate Baskin's testimony, and we so hold.

4. *Heller's Business Records Were Admissible.*

The appellant complains that the District Court erred in admitting certain of Heller's business records in evidence. One of these records was a book containing a running account of the bets made during the day, in which book Baskin saw Heller make entries, although Baskin did not "prepare" the daily book record and was not the custodian of the books. Whitted testified that he had seen Heller make entries in the book in question, and that it was in Heller's handwriting. Similar testimony was given by Mrs. Heller.

Another book was an exemplar of "certain business records" kept by Heller, in which Whitted testified that "all the bets that came in" were recorded. Mrs. Heller testified that she had seen her husband prepare records of that sort, and that it was in his handwriting.

Two other exhibits consisted of books of check stubs, which Mrs. Heller identified as business records of Heller's. Three exhibits were checks in Heller's handwriting and were identified by Mrs. Heller.

One exhibit consisted of "two blue sheets of paper" containing "Heller's handwriting on the inside and (Whitted's) handwriting on the outside". Whitted's writing on these papers or "tickets" was intended to represent "Whether the tickets were winning tickets or losing tickets, and to (the?) total amount of money that

was—the man won or lost". They were admitted for the "limited purpose" of showing that the appellant was sometimes referred to as "J.A." and sometimes as "Jimmy A."

Exhibit No. 10 consisted of the five "parlay cards" already mentioned, which showed that the appellant had won $7900 on October 26, 1946. The final exhibit objected to is the excerpt of the appellant's testimony before the Grand Jury, in which, as we have seen, the appellant denied any knowledge of the five cards, etc.

So far as the admissibility of the various business records is concerned, 28 USCA Sec 1732(a) is applicable:

> *Sec 1732. Record made in regular course of business: photographic copies*
>
> "(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter.
>
> "All other circumstance of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.
>
> "The term 'business', as used in this section, includes business, profession, occupation, and calling of every kind."

Construing a predecessor statute almost identical in language, in all pertinent respects, to the one at bar, the Court in Harper v United States, 8 Cir., 1944, 143 F 2d 795, 806, used the following language:

> "The purpose and effect of this statute is to make admissible any writing if made in the regular course of any business without the strict proof of authenticity which had theretofore been required."[9]

With regard to Mrs. Heller's testimony "as to the meaning of initials, figures, dates and symbols contained" in certain exhibits—concerning which testimony the appellant complains—it has been generally held that persons familiar with given types of documents may testify as to the meaning of symbols and abbreviations used in such documents. Meyer v Everett Pulp & Paper Co., 9 Cir., 1912, 193 F 857, 862; 100 A.L.R. 1465-1466.

Finally, as we have seen, Baskin, Whitted, and Mrs. Heller all testified regarding the manner in which Heller's books were kept. All three knew his handwriting.

The question of whether the authenticity of a document has been sufficiently proved prima facie to justify its admission in evidence rests in the sound discretion of the trial judge. Lewis v United States, 9 Cir., 1930, 38 F 2d 406, 416. We cannot say that in the instant case there was an abuse of discretion.

We hold that Heller's business records were properly admitted.

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[9]See also Wheeler v United States, CA D.C., 1953, 211 F 2d 19, 23, certiorari denied, 1954, 347 U.S. 1019.

5. *The Indictment Was Not Duplicitous.*

The appellant maintains that the first count of the indictment charges "two or more offenses". He does not seem to be able to make up his mind as to how many offenses are thus charged. In his main brief, he counts "five separate offenses". In his reply memorandum, he trims it down to four.

As a matter of fact, the appellant is mistaken in both figures. The indictment charges only *one* offense. True, several searching queries were asked of the appellant during the Grand Jury investigation, but they were all ancillary to the $64 question—or, rather, the $38,000 question; namely, did Baskin hand him the thirty-eight one-thousand-dollar bills that Baskin had just obtained from the teller? The minor questions were all directed toward refreshing the appellant's recollection, so that there could be no mistake as to the deliberateness of his lie that he had not received the money.

In Cornes v United States, 9 Cir., 1941, 119 F 2d 127, 129, we said:

> "Each of the first five counts charged the devising of a single scheme, not two schemes as contended by appellant. True, the scheme contemplated the commission of more than one act, but that did not convert it into two or more schemes or make either of the counts duplicitous. (Case cited.)"

The rule is thus stated in 2 Wharton's Criminal Law, 12th ed., 1932 (Ruppenthal), Sec. 1567, p. 1826:

> "*Several assignments may be incorporated in one count.* All the several particulars, in which the prisoner swore falsely, may be embraced in one count,

and proof of the falsity of any one will sustain the count."[10]

6. *The Instructions of the District Court Were Adequate*

The appellant objects that the trial court failed to give certain requested instructions and also that it gave one erroneous instruction. All the instructions referred to dealt with corroboration.

One requested instruction contains the statement that the corroborating evidence must be "inconsistent with the innocence of the defendant". We have already seen that the weight of authority is opposed to so severe a standard for the corroborating evidence. It is sufficient if the corroborating evidence *tends* to establish the defendant's guilt, and if such evidence *together with* the direct evidence is "inconsistent with the innocence of the defendant".

Another refused instruction asserts that the corroborative evidence "must be equally strong and convincing as the direct testimony which would be regarded as sufficient proof". We have already pointed out that this is tantamount to demanding that the appellee prove its case twice. Such proof is not required by law.

The third requested instruction that the court below declined to give verbatim specified that in the evidence

[10]See also Hovley v United States, 9 Cir., 1922, 277 F 788, 790; Greenbaum v United States, 9 Cir., 1935, 80 F 2d 113, 116; United States v Crummer, 10 Cir., 1945, 151 F 2d 958, 963-964, certiorari denied, 1946, 327 U.S. 785; United States v Coen DC La., 1947, 72 F Supp 10, 12.

of similar acts was included evidence of "acts and declarations and exhibits relating to the transactions of the defendant other than those covered by the statements alleged in the indictment to have been made under oath by the defendant". As we shall see in a moment, the instructions as given referred generally to "evidence" of similar acts, without spelling out the various possible *forms* or *types* in which such evidence might be found. Clearly, the lack of such particularization does not constitute error.

Finally, the appellant complains that a certain given instruction, italicized below, "leaves the impression that anything the witness who testified directly to—if anything she says is corroborated, that alone is enough". The appellant insists that "if the corroboration is to something that is not as to the actual falsity of the thing he is accused of, that is not adequate corroboration . . ."

As we have seen, the Supreme Court has repeatedly held that, with regard to either the quantum or quality of corroboration, the rule "does not relate to the kind or amount of other evidence required. . . ." Hammer v United States, supra, 271 U.S. at page 627. Needless to say, this does not refer to corroboration as to trivi neither does the context of the instruction as given so indicate.

The charge of the District Judge on the subject of corroboration and evidence of similar acts follows in full:

> "The uncorroborated testimony of one witness is not enough to establish the falsity of the testimony of the defendant. The falsity must be evidence (sic) by the testimony of two independent witnesses, or by

one witness and corroborating evidence. In the absence of such proof the defendant must be acquitted.

"By corroborative evidence is meant evidence independent of the testimony of a single witness under oath which substantiates the testimony of that witness. That evidence must be trustworthy. A document such as a bank record or check or business record may constitute corroboration, if you find that it substantiates the testimony of the witness who testified directly as to the falsity of the defendant's statement and is trustworhy.

"The trustworthiness of the corroborative evidence is for you to determine.

"Now, the Court permitted evidence from which you could find that the defendant made false statements to the Grand Jury other than the false statements contained in the indictment. Such evidence, if believed by you, is to be considered by you only insofar as you may find it bears upon or relates to the intent or wilfulness of the defendant with respect to the false statements charged in the indictment.

"You are not to consider the evidence of other false statements made by the defendant to the Grand Jury, if they are found to be false by you, unless you find beyond a reasonable doubt that the defendant made the statements charged in the indictment and that the falsity of those statements was proved in the manner which I have heretofore instructed you is required. It is not to be otherwise considered by you." (Emphasis supplied.)

Taking this charge by its four corners and considering it as a whole—as we must—we find that it is adequate and exhibits no reversible error.

7. *Conclusion*

We have carefully considered the elaborate specification of errors—inaccurately denominated "specifications of error"—compiled by industrious and resourceful counsel. We find nothing in it or in the able supporting briefs that warrants a reversal.

The appellant's guilt is plain. Baskin's accusatory testimony was straightforward and unequivocal on direct examination, and was unshaken on cross. As we have seen, the corroboration, both oral and documentary, was ample.

"A false witness shall not be unpunished."[11]

The judgment is affirmed.

(Endorsed:) Opinion. Filed Oct. 5, 1955.

Paul P. O'Brien, Clerk.

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[11] *Prov.* 19:9.

United States Court of Appeals
for the Ninth Circuit

No. 14,516

James Arena,
Appellant,
vs.
United States of America,
Appellee.

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed:) Judgment

Filed and Entered: October 5, 1955

Paul P. O'Brien, Clerk.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	3
Statement	4
Argument	9
Conclusion	21

CITATIONS

Cases:

Hovley v. *United States*, 277 Fed. 788	20
Korte v. *New York, N. H. & H. R. Co.*, 191 F. 2d 86, certiorari denied, 342 U. S. 868	12
Lewis v. *United States*, 38 F. 2d 406	12
McWhorter v. *United States*, 193 F. 2d 983	15, 16, 17
Magen v. *United States*, 24 F. 2d 325, certiorari denied, 277 U. S. 595	20
Meyer v. *Everett Pulp & Paper Co.*, 193 Fed. 857	13
Miranda v. *United States*, 196 F. 2d 408, certiorari denied, 344 U. S. 842	15
Morgan v. *United States*, 149 F. 2d 185, certiorari denied, 326 U. S. 731	12
Opper v. *United States*, 348 U. S. 84	17
Palmer v. *Hoffman*, 318 U. S. 109	11
Pointer v. *United States*, 151 U. S. 396	20
Radomsky v. *United States*, 180 F. 2d 781	16
Smith v. *United States*, 348 U. S. 147	17
United States v. *Crummer*, 151 F. 2d 958, certiorari denied, 327 U. S. 785	20
United States v. *Hardyman*, 13 Pet. 176	13
United States v. *Hiss*, 185 F. 2d 822, certiorari denied, 340 U. S. 948	15
United States v. *Neff*, 212 F. 2d 297	15, 16, 17
United States v. *Otto*, 54 F. 2d 277	20
United States v. *Rose*, 215 F. 2d 617	16
United States v. *Seymour*, 77 F. 2d 577	20

Cases—Continued Page.
Warzower v. *United States*, 312 U. S. 342 17
Weiler v. *United States*, 323 U. S. 606 .... 14, 16, 17, 18
Wheeler v. *United States*, 211 F. 2d 19, certiorari denied, 347 U. S. 1019 12
Statutes:
18 U. S. C. 1621, 62 Stat. 773 3
28 U. S. C. 1732 (a), 62 Stat. 945 3
Misc.:
100 A. L. R. 1465 13
Wharton on *Criminal Law*, 12th Ed., Sections 1567, 1582 20
VII Wigmore, Evidence (3d ed., 1940), § 2042, pp. 278–279 15

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 550

JAMES ARENA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 251–267; Pet. App. i–xxii) is reported at 226 F. 2d 227.

JURISDICTION

The judgment of the Court of Appeals was entered on October 5, 1955 (R. 268), and a petition for rehearing was denied on November 7, 1955 (R. 269). The petition for a writ of certiorari was filed on December 3, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether, in a prosecution for perjury in the course of a grand jury investigation of income tax evasion as the result of gambling activities, there was a proper foundation for admitting in evidence account books, check stubs, and checks of a deceased betting commissioner reflecting certain bets placed by petitioner.

2. Whether the betting commissioner's widow, who had worked for him in his betting business and was familiar with these records, was properly permitted to testify as to the meaning of certain symbols in them.

3. Whether the evidence was sufficient to sustain petitioner's conviction of perjury, where there was the direct testimony of a single witness as to the falsity of petitioner's statement before the grand jury and corroborative evidence supporting that witness's version of the events.

4. Whether the court's charge, that perjury could be proved by the testimony of a single witness in addition to trustworthy corroborative evidence substantiating the testimony of that witness, was correct.

5. Whether an indictment covering one principal transaction involving perjury, as distinguished from separate and independent incidents, was duplicitous.

STATUTES INVOLVED

18 U. S. C. 1621, 62 Stat. 773; provides:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both.

28 U. S. C. 1732 (a), 62 Stat. 945, provides:

> In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term "business", as used in this section, includes business, profession, occupation, and calling of every kind.

STATEMENT

Petitioner was charged in the United States District Court for the Northern District of California in a two-count indictment (R. 3–7) with perjury before a federal grand jury in violation of 18 U. S. C. 1621 (*supra*, p. 3). He was convicted under the first count (R. 26),[1] and sentenced to imprisonment for three years (R. 33-34). On appeal (R. 35), the conviction was unanimously affirmed (R. 268).

The pertinent evidence may be summarized as follows:

In May 1953, the grand jury was making an investigation of tax evasion by Arthur Samish and one Flynn in connection with income from their gambling activities (R. 49–51). Zola (Tiny) Heller, who died in January 1952, operated a hotel, bar and liquor store in the same building, and also operated as a betting commissioner with

[1] The court sustained petitioner's motion for acquittal on the second count, which was not submitted to the jury (R. 25, 176–177).

a small office in the back of his liquor store (R. 78, 80, 133). Irving Baskin took care of the records of Heller's legitimate businesses and did his banking (R. 79). The perjury charge grew out of petitioner's testimony as to transactions with Baskin, which defense counsel stipulated to be material to the investigation (R. 61, 64, 198).[2]

Before the grand jury, petitioner had testified that he had known Irving Baskin and Tiny Heller; that he had placed some small bets of $20 or $30 with Heller; and that the most he had ever won was about $100 (R. 70–72). The testimony charged in count one of the indictment (R. 4–5) as being perjurious was as follows (R. 73–75):

> By Mr. Olney:
>
> Q. I see. On this occasion Mr. Baskin says you accompanied him to the bank while he proceeded to cash some checks in return for which there were 38 one thousand dollar bills which were obtained from the bank, and that the teller counted that $38,000 out in your presence, to him and he in turn counted the $38,000 in these one thousand dollar bills to you and gave you the bills.
>
> A. I didn't get them, sir.

[2] Exhibit 1 was a transcript of petitioner's grand jury testimony, parts of which were read to the jury (R. 55). Since the defense did not offer any evidence, the only exhibits referred to are those of the government.

Q. Did that happen?

A. No, sir.

Q. Anything like it?

A. No, sir.

Q. Did you ever go there to the bank with this Baskin?

A. No, but I was in that bank most every single day in my own business. I have seen and been in there dozens of times, I will say, but I am always in that bank every single day ever since I had my liquor business, that is where I used to bank.

Q. Has Mr. Baskin ever delivered any money to you?

A. No, sir.

Q. Even one cent?

A. Never had occasion to.

By Mr. BURKE:

Q. Your testimony is that on no occasion did anyone ever pay you any amount of money, one dollar or $38,000, to be delivered to you personally as your own money or on behalf of Mr. Samish or anyone else?

A. That's correct, Mr. Burke.

By the FOREMAN:

Q. Did you ever do any business with Mr. Baskin or have any transaction with Mr. Baskin in any bank in Oakland?

A. I did not, sir.

Q. And you never received $38,000 from Mr. Baskin?

A. No, sir.

At the trial, Baskin testified that during 1947 he would see petitioner in Heller's place of business about three or four times a week (R. 88). Contrary to petitioner's testimony before the grand jury (R. 74), Baskin stated that on two or three occasions he delivered sealed envelopes from Heller to petitioner at the latter's liquor store (R. 89). As to the incident involved in count one of the indictment, Baskin testified that in December 1947 Heller gave him four checks, one of which was Heller's personal check, making a total of $38,000, and directed him to go to the bank and "get them cashed into one thousand dollar bills and then give them to Jimmy [petitioner]" (R. 90–92). Petitioner and Baskin then walked several blocks from Heller's office to the bank, where a teller named Wirth[3] got authority from his superior, Madeiros, to cash the checks, and counted out 38 one thousand dollar bills (R. 92–95). Baskin testified (R. 95–96): "Then I called [petitioner] over and I counted the money over to him. He took the money, put it in his pocket."

Madeiros, the assistant bank cashier, testified that on December 4, 1947, $38,000 was paid on behalf of Heller by a bank teller named Wirth, after Madeiros had obtained approval for this from senior bank officers. The payment was for

[3] Wirth was deceased at the time of trial (R. 187).

four checks, one of which was Heller's personal check for $6,050 payable to cash, and the others in amounts of $13,700, $9,350, and $8,900, for a total of $38,000. (R. 158–163, 166; Exs. 11 and 12.) Madeiros testified that Heller's check for $6,050 (Ex. 8) had been indorsed by Baskin, with whose signature Madeiros was familiar (R. 163–164).

Witness Whitted worked for Heller from 1941 to 1947, one of his duties being to fix the odds on football and baseball games (R. 100–101). Whitted stated that he saw petitioner on Heller's premises about five or six days of the week (R. 102). During 1941 and 1942, petitioner made only small bets of from $20 to $50, but in 1946 and 1947 they ranged from $100 to $3,000 (R. 105). Whitted recorded some of these bets (R. 106). In the earlier years, Samish placed his own bets which were recorded as "AS"; later, from 1945 to 1947, the bets were made by petitioner for Samish and recorded as "SA" (R. 121–122). Exhibit 10 showed five football parlay card bets recorded by Whitted for petitioner on behalf of Samish on October 26, 1946, which resulted in a $7,900 win (R. 108, 109, 125, 131). Whitted overheard telephone calls from Heller's office by petitioner to Samish for the purpose of arranging bets (R. 123–124). Whitted also saw Heller

make large bet payments of several thousand dollars to petitioner (R. 131, 132).[4]

Heller's widow testified that he conducted some of his business from his home; that she sometimes worked at the betting office; and that on occasions she recorded bets for him, including a bet by petitioner (R. 133–134, 139). Mrs. Heller identified Exhibit 3 as representing Heller's betting records for the "week ending 11/30/47". The first three pages of this exhibit showed that Samish, indicated by "S. A.", had won $34,800 (R. 142–143, 145). Exhibit 5 contained a check stub for Check No. 1670, dated December 3, 1947, to the "S. A." account of Samish, and Exhibit 8 was Heller's check, with the same number as the check stub, for $6,050, dated December 3, 1947 (R. 143).

ARGUMENT

1. Petitioner contends that Exhibits 2 through 8 (Heller's account books, check stubs, and checks) were improperly admitted in evidence by reason of insufficient foundation (Pet. 10–13). There is clearly no merit to this point.

[4] Before the grand jury, petitioner denied knowing anything about five football parlay cards for October 26, 1946, with the initials "J. A.". Petitioner also denied before the grand jury that he had placed any bets with Whitted, including the October 26, 1946 bets represented by Exhibit 10. (R. 168–169.)

Baskin testified that he had occasion to examine and was familiar with Heller's betting commission records (R. 81–82). He identified the challenged exhibits, all of which were later admitted in evidence, as being in Heller's handwriting (R. 82–87). Exhibit 2 was Heller's account book reflecting bets made (R. 82, 118, 134–135). Exhibit 3 was the kind of record on which Heller would jot down bets as they came in over the telephone (R. 83, 118–120, 135–136). Exhibits 4 and 5 were Heller's check stub books (R. 84–85, 137). Exhibits 6, 7 and 8 were checks in Heller's handwriting, dated October 28, 1946, October 30, 1946, and December 3, 1947, respectively (R. 86–87, 137–138).

Whitted had seen Heller making entries in Exhibit 2, and recognized Heller's handwriting in it (R. 118). He also saw Heller working on books like Exhibit 3, and identified Heller's handwriting therein (R. 118–120). Mrs. Heller identified Exhibits 2 through 8 as business records in Heller's handwriting, kept in connection with his betting commission business (R. 134–138). The exhibits were admitted first as exemplars of certain business records kept by Heller, but later the court stated they were "admitted as ordinary business records" (R. 136, 137, 138, 141).

All this testimony rendered the exhibits admissible under 28 U. S. C. 1732, *supra,* pp. 3–4. The purpose of the federal "shop book" statute is to

facilitate admission in evidence of records which experience has shown to be trustworthy, and it should be "liberally interpreted so as to do away with the anachronistic rules which gave rise to its need and at which it was aimed". *Palmer* v. *Hoffman*, 318 U. S. 109, 115. Applying that rule here, it is clear that a sufficient foundation was laid for the introduction of the records. Obviously, the fact that Heller, the maker of the records, could not testify by reason of his death did not operate to make them inadmissible. The three witnesses who did testify were thoroughly familiar with his bookkeeping methods, and had close relationships to his betting business, so that their testimony involved direct knowledge—not mere conclusions or surmise.

There is nothing in the statute, or in the cases cited by petitioner, expressly requiring that a person testifying shall be the custodian of the records or the supervisor of the persons making the records—although this can be, and often is, the case. The three witnesses possessed the most important qualifications for testimony regarding the records, *i. e.,* intimate and reliable knowledge of the fact that these records were kept in the regular course of Heller's business, the manner in which they were kept, and what they meant. It was not necessary that their testimony embody formalistic words that the records were entered in "the regular course of such business"; that the records

were so made was implicit in the nature of the transactions as to which testimony was given. *Cf. Korte* v. *New York, N. H. & H. R. Co.*, 191 F. 2d 86, 90–91 (C. A. 2), certiorari denied, 342 U. S. 868. Neither was it of controlling importance that in some instances the witnesses could not positively identify the particular record, so long as they were certain it was the kind or type of record maintained by Heller in the regular course of his business. *Cf. Wheeler* v. *United States*, 211 F. 2d 19, 21–23 (C. A. D. C.), certiorari denied, 347 U. S. 1019.

Whether the authenticity of documentary records has been sufficiently proved to justify their admission in evidence is a matter resting within the sound discretion of the trial judge. *Cf. Lewis* v. *United States*, 38 F. 2d 406, 416 (C. A. 9); *Morgan* v. *United States*, 149 F. 2d 185, 188 (C. A. 5), certiorari denied, 326 U. S. 731. The court below correctly held that this discretion was not abused here (Pet. App. xvii).

2. Since Exhibits 2 through 8 were rightly admitted in evidence, Mrs. Heller was properly permitted to testify as to the meaning of symbols in the exhibits, *e. g.*, that "S. A." referred to the Samish account (see Statement, *supra*, pp. 8–9).[5]

[5] Mrs. Heller testified as to occasions when petitioner was present at Heller's home to make bets, and made telephone calls to Samish (R. 152–154). Since Whitted had also testified that "S. A." referred to bets made by petitioner for Samish (R. 120–121), Mrs. Heller's testimony on this was cumulative.

Petitioner's contention that Mrs. Heller was not sufficiently familiar with the contents of the exhibits to qualify her as a competent witness (Pet. 13–15) is refuted by the record. She had worked for her husband in connection with his betting, both at home and in his office, and on occasions had herself recorded bets. She knew the exhibits as records maintained by her husband in connection with his betting business, and identified his signature on all the exhibits. (*Supra*, pp. 9, 10.) The fact that she did not herself make entries in the exhibits was immaterial, in view of her adequate knowledge as to the manner of keeping the records and their meaning. Persons familiar with documentary records may testify as to the meaning of symbols and abbreviations used in them. *Cf. United States* v. *Hardyman*, 13 Pet. 176; *Meyer* v. *Everett Pulp & Paper Co.*, 193 Fed. 857, 862 (C. A. 9); Note, 100 A. L. R. 1465.

3. Petitioner also urges (Pet. 16–20) that the evidence was insufficient to sustain the perjury conviction because the testimony offered in corroboration of Baskin's testimony did not directly relate to the alleged falsity of petitioner's testimony that he received no money from Baskin.

Baskin testified (R. 95–96) that he delivered 38 one thousand dollar bills to petitioner in the presence of the teller Wirth at the bank, this being contrary to petitioner's grand jury testimony (R. 73–75) (*supra*, pp. 5–7). His testimony

was corroborated by Exhibits 11 and 12, bank records showing the cashing of four checks totaling $38,000, and Madeiros' testimony that one check (Exhibit 8) was Heller's for $6,050, and had been indorsed by Baskin (*supra*, pp. 7–8, 9).

There was also evidence from Heller's books strongly tending to show that the $38,000 was in payment of recent winnings on bets by Samish, and also evidence that petitioner regularly acted as agent in making bets with Heller for Samish, and that on other occasions petitioner had received large sums of money from Heller (*supra*, pp. 8–9).

It is true that the corroborative evidence did not directly *prove* that Baskin had disposed of the $38,000 by delivering it to petitioner. We do not, however, read the perjury cases as requiring that the corroborative evidence must itself—apart from the direct testimony of the single witness—establish all aspects of the accused's false testimony. Here, the corroborative evidence was sufficient to meet the requirements of the perjury rule enunciated by this Court in *Weiler* v. *United States*, 323 U. S. 606, 610:

> Two elements must enter into a determination that corroborative evidence is sufficient: (1) that the evidence, if true, *substantiates the testimony of a single witness who has sworn to the falsity of the alleged perjurious statement;* (2) that the

> corroborative evidence is trustworthy. [Emphasis added.] [6]

The additional testimony must be "corroborative," not full proof in itself. There was testimony by Baskin that directly established the falsity of petitioner's testimony and strong evidence tending to corroborate Baskin's version of the events, including the handing over of the $38,000 to petitioner. The rule laid down by this Court in *Weiler* requires no more.

There are, as petitioner points out (Pet. 19–20), general statements in opinions by courts of appeal which may be said to be to the effect that the corroborative testimony must independently tend to show all elements of the perjury. *E. g., United States* v. *Neff,* 212 F. 2d 297, 306 (C. A. 3); *McWorter* v. *United States,* 193 F. 2d 982, 983, 985 (C. A. 5); *United States* v. *Hiss,* 185 F. 2d 822, 824 (C. A. 2), certiorari denied, 340 U. S. 948; *Miranda* v. *United States,* 196 F. 2d 408, 411 (C. A. 9), certiorari denied, 344 U. S. 842. To the extent that judgments of conviction were affirmed under that standard, they present no conflict since the evidence was *a fortiori* sufficient under what we deem to be the proper standard.

[6] Compare VII Wigmore, Evidence (3d ed., 1940), § 2042, pp. 278–279: "As to the *nature of the corroboration*, no detailed rule seems to have been laid down, nor ought to be laid down. The jury should be instructed not to convict unless the testimony of the principal witness has been so corroborated that they believe it to be true beyond a reasonable doubt." [Italics in original.]

In the two leading cases where reversal was predicated on such a ground, *Neff* and *McWhorter*,[7] the evidence was in any event insufficient under the *Weiler* rule, as we interpret it. In *Neff*, to corroborate the testimony of a single witness that he had seen the defendant at Communist Party meetings contrary to her sworn statement, the government introduced evidence that the defendant had collected dues at the union office for the Communist Party, that she had signed a petition to place a Communist candidate on the ballot, and that she had been called a Communist. None of this evidence was directly corroborative of the particular testimony by the single direct witness as to Communist Party meetings, in the sense that the testimony of the bank officer in this case is corroborative of Baskin's testimony as to his cashing of the check at the bank or Baskin's testimony as to the payment to petitioner is corroborated by the documentary and oral evidence that petitioner was Samish's betting agent, that Samish had won at least $35,000 shortly before the cashing of the checks at the bank, and that Heller's records showed his check as credited to Samish

[7] In *United States* v. *Rose*, 215 F. 2d 617 (C. A. 3), cited by petitioner (Pet. 20), the evidence as a whole was found insufficient. In *Radomsky* v. *United States*, 180 F. 2d 781 (C. A. 9), from the circuit which decided this case, there was no direct evidence.

(*supra*, pp. 7–9).[8] Thus, the testimony in *Neff* did not meet the *Weiler* rule that the corroboration should substantiate "the testimony of a single witness who has sworn to the falsity of the alleged perjurious statement", whereas the corroborative testimony here did directly substantiate the witness' testimony in all its significant elements. In *McWhorter*, the government had no independent witness at all, having merely proved by two witnesses that the defendant made prior inconsistent statements under oath.

Under these circumstances, despite the possible implications of the statements in the various opinions cited, we do not believe that there is presented the type of conflict which calls for resolution by this Court, particularly since the correct standard has been clearly set forth by this Court in *Weiler*. Moreover, as the court below noted, dictum in *Warzower* v. *United States*, 312 U. S. 342, 347–348, drew an analogy between the corroboration required in perjury and confession cases, as to the latter of which there had been conflicting views among the various courts of appeal. That conflict was settled by this Court's decisions in *Opper* v. *United States*, 348 U. S. 84, and *Smith* v. *United States*, 348 U. S. 147, that in confession cases the rule is that "the corrobora-

[8] The latter group of corroborative evidence might well be said to "tend to show", in itself, the falsity of petitioner's denial that he received the money from Baskin.

tive evidence need not be sufficient, independent of the statements, to establish the *corpus delicti.*" 348 U. S. at 93; see also 348 U. S. at 156. That rule as to confessions is in accord with what we understand to be the rule laid down as to perjury in *Weiler, i. e.,* that the corroboration need go only to support and substantiate the truth of the testimony of the single witness. The Court's decisions therefore seem now to have settled the problem as to the degree of corroboration required, not only for confessions, but in perjury cases.

4. Closely related to petitioner's argument on insufficiency of the evidence is his contention that the court's charge regarding corroborative evidence in a perjury case was erroneous (Pet. 20–25). The pertinent part of the charge is as follows (R. 230):

> In order to sustain a conviction for perjury there must be direct and positive evidence of the falsity of the statement made under oath. The falsity of the statement made under oath must be proved by clear and convincing evidence. The uncorroborated testimony of one witness is not enough to establish the falsity of the testimony of the defendant. The falsity must be evidence [sic] by the testimony of two independent witnesses, or by one witness and corroborating evidence. In the absence of such proof the defendant must be acquitted.

> By corroborative evidence is meant evidence independent of the testimony of a single witness under oath which substantiates the testimony of that witness. That evidence must be trustworthy. A document such as a bank record or check or business record may constitute corroboration, if you find that it substantiates the testimony of the witness who testified directly as to the falsity of the defendant's statement and is trustworthy.
>
> The trustworthiness of the corroborative evidence is for you to determine.

This instruction stands or falls by whether the decision of the court below on the nature of the corroborative evidence is correct. If, as we believe, the corroboration must be of the direct witness, and not necessarily tend, directly and in itself, to prove all elements of the falsity, it is manifestly correct.

5. Finally, petitioner argues that count one of the indictment was duplicitous, as alleging five separate offenses of perjury instead of the one for which he was convicted (Pet. 25–30).

Clearly, however, all of the questions related to the one separate transaction, *i. e.*, whether Baskin had received the 38 one thousand dollar bills from the teller at the bank and delivered them to petitioner. After petitioner made his original denial before the grand jury that this ever occurred, the ensuing ancillary questions were asked

only for the purpose of emphasizing and clarifying petitioner's denial; they manifestly did not seek to, nor did they cover, other separate and different transactions which Baskin may have had with petitioner at the bank. Petitioner makes no showing that he was embarrassed or confused in the presentation of his defense by reason of a multiplicity of charges. Accordingly, the trial court did not abuse its discretion in ruling that the indictment was not duplicitious. Cf. *Pointer* v. *United States*, 151 U. S. 396, 403–404; *Magen* v. *United States*, 24 F. 2d 325, 326, 328 (C. A. 2), certiorari denied, 277 U. S. 595; *United States* v. *Crummer*, 151 F. 2d 958, 963–964 (C. A. 10), certiorari denied, 327 U. S. 785; *Hovley* v. *United States*, 277 Fed. 788 (C. A. 9). See also Wharton on *Criminal Law*, 12th Ed., Sections 1567, 1582; *United States* v. *Otto*, 54 F. 2d 277, 279–280 (C. A. 2).[9]

[9] In *United States* v. *Seymour*, 77 F. 2d 577 (C. A. 8), on which petitioner relies, the statement indicating that the indictment there might have been duplicitous if the multiple charges had been joined in one count is dictum. In *Seymour*, moreover, the court recognized that the "statements covered by the several counts referred to different matters of inquiry" (at p. 581), in contrast to the instant case where only one transaction is involved.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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